In the Supreme Court

OF THE

United States

Supreme Court, U.S.
FILED
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OCTOBER TERM, 1993

No. 92-1384

BARCLAYS BANK PLC,
Petitioner,

VS.

FRANCHISE TAX BOARD,
AN AGENCY OF THE STATE OF CALIFORNIA,
Respondent.

No. 92-1839

COLGATE-PALMOLIVE COMPANY,
Petitioner,

VS.

FRANCHISE TAX BOARD,
AN AGENCY OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

PETITIONERS' OPPOSITION TO CALIFORNIA LEGISLATURE'S MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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Petitioners Barclays Bank PLC ("Barclays") and Colgate-Palmolive Company ("Colgate") hereby oppose the California Legislature's Motion for Leave to File Brief Amicus Curiae.[1] The California Legislature's motion should be denied because (1) the brief is an improper second brief of a party, the State of California, whose interests are already adequately represented by Respondent, and (2) there is no evidence before this Court that the California Legislature authorized the filing of an amicus brief.

It is self-evident that a party to a dispute may not file an amicus brief on its own behalf. Thus, in *United States v. Smith*, the U.S. District Court denied the U.S. Sentencing Commission, an agency of the federal government, permission to appear as amicus because the U.S. Government was already a party to the dispute. *United States v. Smith*, 686 F. Supp. 847, 853 n.9 (D. Colo. 1988). The court stated that "[a] clear precondition of appearing as an amicus curiae . . . is that the movant not be a party to the dispute at issue."

Here Respondent and the California Legislature are both arms of the State of California. The State of California's designated representatives are already before this Court. The California Legislature vested Respondent with the power and duty of enforcing California's tax upon corporations in civil actions and designated the California Attorney General as Respondent's counsel. Cal. Rev. & Tax. Code §§ 19371-19372, 19382-19389 (West Supp. 1994). When the Attorney General appears, the State of California is in court. *California and Northern Ry. v. State*, 1 Cal. App. 142, 144 (1905).

Moreover, the interests of the California Legislature and Respondent in this case are the same. The California Legis-

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[1] There have been no changes to the Rule 29.1 Statements in the above referenced consolidated case since the Briefs of the Petitioners were filed with this Court.

lature alleges that its interest is to represent California's "power to enact legislation to impose tax." However, the California Attorney General, as the State's chief law enforcement officer, represents all the rights and interests of the State of California in all civil tax matters, including these cases. Cal. Gov't Code § 12511 (West 1992); *People v. Birch Securities*, 86 Cal. App. 2d 703 (1948), *cert. denied*, 336 U.S. 936 (1949). Respondent's power to collect and defend a disputed tax embodies California's power to tax; these powers cannot be wrenched apart. The California Legislature's brief amicus curiae is an improper second appearance by the State of California that subverts this Court's briefing rules. S. Ct. Rules 24, 25, 33 and 37.

Even if the California Legislature were a separate party, its brief would be inappropriate. When the interests of an amicus are adequately represented, its brief is unnecessary and unduly burdens the Court. S. Ct. Rule 37.1; *see, e.g., In re Oskar Tiedemann and Co.*, 289 F.2d 237, 240 n.5 (3d Cir. 1961); *United States v. Andrews*, 1983 WL 18974 (N.D. Ill. 1993) (mem.). The California Attorney General has been defending the State's sovereign taxing powers since these cases began and the California Legislature has never asserted that the Attorney General's representation was inadequate.

There are limited circumstances when a second branch of government has been allowed to file as an amicus: when a case may impact a legislative body's law making procedures, *see, e.g., Yip v. Pagano*, 606 F. Supp. 1566 (D.N.J. 1985), *aff'd*, 782 F.2d 1033 (3d Cir. 1986); or when its position in the case was clearly at odds with the other governmental entity, *see, e.g., New York v. Uplinger*, 467 U.S. 246, 247 n.1 (1984); *United States v. Louisiana*, 751 F. Supp. 608 (E.D.L.A. 1990); *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl.), *cert. denied*, 434 U.S. 1007 (1977). Neither exception is applicable here. The California Legislature has

identified no special legislative procedure that is in jeopardy. Its brief does not advocate any positions contrary to Respondent's; it merely echos Respondent's arguments.

In addition, there is no evidence that the brief filed with the Court is an authorized position of the California Legislature. Under California law, the Legislative Counsel is forbidden to appear in court proceedings without the prior approval either by resolution of the Joint Rules Committee or by concurrent resolution of both houses of the Legislature.[2] Cal. Gov't Code § 10246 (West 1992). The brief to be filed by the California Legislative Counsel contains neither an assertion of such authorization nor any other evidence that the California Legislative Counsel has the authority to speak for the California Legislature. Petitioners have diligently searched the minutes of the Joint Rules Committee and the Official Journal of the Legislature and have twice requested a copy of any such authorization from Legislative Counsel. *See* Appendices A and B. No authorization has been located. Accordingly, there is no basis for this Court to conclude that the brief filed with movant's motion is an authorized representation of the views of the California Legislature.

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[2] An exception arising upon termination of the Joint Rules Committee is not applicable here.

For the foregoing reasons, we respectfully request that the Motion for Leave to File Brief Amicus Curiae filed by the California Legislative Counsel on behalf of the California Legislature be denied.

Respectfully submitted,

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APPENDIX A

[LETTERHEAD]

January 14, 1994

VIA FACSIMILE
Bill S. Heir
Deputy Legislative Counsel
State Capitol, Suite 3021
Sacramento, CA 95814-4996

Barclays Bank PLC v. Franchise Tax Board

Dear Bill:

In your conversation with Jim Kleier and me, you mentioned that you had received authorization from the Joint Rules Committee. Could you please send us a copy of the resolution or other action, either by the Joint Rules Committee or by the Legislature? It is my understanding that under the Government Code action by the Joint Rules Committee as a committee is required and that such action would be taken in an open meeting. The other alternative is, of course, a concurrent resolution by both houses of the Legislature. We have been unable to find evidence of either. Accordingly we would appreciate copies.

Very truly yours,

Joanne M. Garvey

cc: James Kleier

APPENDIX B

[LETTERHEAD]

February 11, 1994

VIA FACSIMILE
Bill S. Heir
Deputy Legislative Counsel
State Capitol, Suite 3021
Sacramento, California 95814-4996

Barclays Bank PLC v. Franchise Tax Board;
Colgate-Palmolive v. Franchise Tax Board

Dear Mr. Heir:

On January 14, 1994 I wrote you to request evidence of authorization for the Legislative Counsel's office to file an amicus curiae brief on behalf of the California Legislature in the *Barclays* and *Colgate-Palmolive* cases. Under the Government Code, such authorization would require either vote at an open and public meeting of the Joint Rules Committee or a concurrent resolution by both houses of the Legislature during open session. We have continued to search but have been unable to find evidence of either. I renew my request, also made on behalf of James Kleier, Counsel for Colgate, for a copy of the resolution or other action which permits the appearance of the Legislative Counsel in either of these cases.

Very truly yours,

Joanne M. Garvey

cc: James Kleier